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No. 85-782

In The

Supreme Court of the United States

October Term, 1985

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

v.

LUZ MARINA CARDOZA-FONSECA,

Respondent.

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Is there a difference between the "well-founded fear of persecution" standard applied to requests for asylum under section 208(a) of the Immigration and Nationality Act, 8 U.S.C. § 1158(a), and the "clear probability" standard applicable to requests for withholding of deportation under section 243(h) of the Act, 8 U.S.C. § 1253(h)?

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STATEMENT

Luz Marina Cardoza-Fonseca is a native and citizen of Nicaragua who last entered the United States as a visitor on June 25, 1979. She remained longer than her authorized stay, and deportation proceedings were instituted.

At a hearing before an immigration judge on December 14, 1981, Respondent conceded deportability, applied for asylum pursuant to § 208 of the Immigration and Nationality Act, 8 U.S.C. § 1158, and applied for withholding of deportation pursuant to § 243(h) of the Act, 8 U.S.C. § 1253(h).

Respondent testified that she holds a political opinion which is opposed to the Sandinista regime. (Administrative Record, hereinafter "AR", 72 and 73.) She believes that her political opinion is likely to be brought to the attention of the authorities in Nicaragua because of her close relationship with her brother who is a political opponent of the Sandinista government. (AR 58, 59.) Her brother had previously been a Sandinista, but during the Somoza regime, he was betrayed by his former Sandinista comrades and was arrested and tortured. (AR 34, 37, 40, 42.) After this denunciation, Respondent's brother renounced his affiliation to the Sandinista movement, and publicly criticized its progression towards communism. (AR at 38, 39, 40, 42.) He subsequently came to the United States and applied for asylum. (AR 31.)

Respondent fears that, if she returns to Nicaragua, the Sandinista regime will persecute her to retaliate against her brother, or to try to extract information from her which the Sandinistas believe he has told her. (AR 50, 51, 55, 58, 59.) Relatives in Nicaragua advised Respondent it was too dangerous for her to return, and that the Sandinistas were still vigorously searching for her brother. (AR 58, 59.)

The immigration judge applied a clear probability standard of proof to Respondent's applications for asylum and withholding of deportation, and denied both requests.

The Board of Immigration Appeals (hereinafter, "the Board") dismissed Respondent's appeal, agreeing with the immigration judge. The Board ignored Respondent's argument that the clear probability standard was the wrong standard to apply to the asylum request, and ruled that its conclusion would be the same whether it applied "a standard of 'clear probability', 'good reason', or 'realistic likelihood'" of persecution. (AR 3). The Board subsequently explained this terminology by stating that "the standards for asylum and withholding of deportation are not meaningfully different and, in practical application, comparable". *Matter of Acosta*, Int. Dec. No. 2986, p. 25 (1985).

The Court of Appeals reversed the Board's decision and remanded for further proceedings, *Cardoza-Fonseca v. INS*, 767 F.2d 1448, 1455 (9th Cir. 1985). It held that the well-founded fear standard applicable to asylum claims is more generous than the clear probability standard applicable to withholding of deportation. *Id.* at 1453. Therefore, the Court of Appeals found that the Board of Immigration Appeals erred by applying the clear probability standard of proof to Respondent's asylum application, and remanded the asylum claim for consideration under the proper legal standard. *Id.* at 1455.

SUMMARY OF ARGUMENT

The Refugee Act of 1980 incorporated into U.S. law the internationally accepted definition of "refugee". This definition requires proof of a "well-founded fear of persecution". 8 U.S.C. § 1101(a)(42)(A). Under the scheme

of the Immigration and Nationality Act, this definition applies to overseas refugee admissions (§ 207) and asylum (§ 208). The well-founded fear standard is distinct from the clear probability standard which this Court held in *INS v. Stevic*, 467 U.S. 407 (1984), to be applicable to withholding of deportation (§ 243(h)). The court below, and three of the four other circuit courts which have considered this issue, have concluded that the well-founded fear standard is more generous than the clear probability standard. This interpretation conforms to Congress' intent as expressed in the plain language, statutory scheme, and legislative history of the statute. The historical origins of this standard in U.S. and international law also support this conclusion.

Starting with the plain language of the statute, the well-founded fear standard for asylum and the clear probability standard for withholding are obviously different. In using different language, Congress must be presumed to have intended to create distinct standards. *See Russello v. United States*, 464 U.S. 16, 21 (1983). The scheme of the Immigration and Nationality Act, in which asylum and withholding of deportation each play a unique role, further reinforces this presumption.

The legislative history of the asylum statute demonstrates that Congress purposefully incorporated the well-founded fear standard from the United Nations Protocol Relating to the Status of Refugees and directed that the language be interpreted consistently with the Protocol. On the other hand, there is not a shred of evidence in the legislative history to support the Petitioner's argument that Congress considered the well-founded fear standard to be equivalent to the clear probability standard for withholding of deportation.

Historically, our refugee admission laws have provided a more generous standard than the clear probability standard. *See, e.g., Matter of Tan,* 12 I.&N. Dec. 564 (BIA 1967) and *Matter of Ugricic,* 14 I.&N. Dec. 384 (Dist. Dir. 1972). In mandating a well-founded fear standard for asylum but not for withholding of deportation, Congress continued the historical distinction between the standards of proof for refugee admissions and withholding of deportation.

The decision below also comports with the intent of Congress that the refugee standard be interpreted consistently with the U.N. Protocol. Both the history of the Protocol and the United Nations' own interpretations found in the U.N. *Handbook on Procedures and Criteria for Determining Refugee Status,* reject the purely objective, balancing of probabilities approach championed by the Petitioner.

In *INS v. Stevic,* 467 U.S. 407 (1984), this Court recognized that the asylum and withholding of deportation provisions of the Immigration and Nationality Act were independent, each with a distinct history, purpose, and language. *Id.* at 425-428. Although the meaning of the well-founded fear standard was not decided in *Stevic,* the reasoning of the case supports the decision of the court below that the standard is more generous.

The agency's construction of the statute frustrates the expressed intent of Congress to adopt the more generous standard of the U.N. Protocol. Moreover, Congress did not delegate to the Executive the discretion to determine the substantive standard of proof for asylum. This Court, therefore, should not defer to the agency's position that the two standards are identical. *See Espinoza v Farah Manufacturing Co.,* 414 U.S. 86, 94-95 (1973).

Congress expressly intended to codify in the Refugee Act of 1980 the U.N. interpretation of the well-founded

fear standard. In accordance with this intent, the Ninth Circuit correctly held that asylum applicants need only submit evidence which would lead a reasonable person to believe that he or she may be persecuted, i.e., that persecution is a reasonable possibility.

ARGUMENT

I.

THE PLAIN LANGUAGE OF THE STATUTE AND AN ANALYSIS OF THE STATUTORY SCHEME DEMONSTRATE THAT THE WELL-FOUNDED FEAR OF PERSECUTION STANDARD IS MORE GENEROUS THAN THE CLEAR PROBABILITY OF PERSECUTION STANDARD.

A. The Plain Language Of The Asylum Statute Is Distinct From The Statute For Withholding Of Deportation.

The Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 *et seq.* (1982), (hereinafter, the "Act") provides two independent statutory mechanisms for persons at or inside the borders of the United States who claim a fear of persecution if returned to their country of origin. The asylum statute, § 208 of the Act, 8 U.S.C. § 1158, requires that an alien must show a "well-founded fear of persecution". *See* § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (1982). The other statute, § 243(h) of the Act, 8 U.S.C. § 1253(h) (1982), provides for withholding of deportation, but does not specify a standard. Section 243(h) has been interpreted by this Court to require proof that persecution is "more likely than not". *INS v. Stevic,* 467 U.S. 407, 429-430 (1984).

Petitioner contends that "the standards . . . are not meaningfully different", Pet. Brief at 7, however, the language of the statute and the statutory scheme demonstrate that Congress considered the well-founded fear

standard to be more generous. In *Stevic,* this Court ruled that the well-founded fear of persecution standard did not apply to § 243(h), and therefore did not decide the meaning of the standard.

The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 107, amended § 243(h).[1] This amendment was merely to clarify the mandatory nature of our *non-refoulement* obligation (prohibition on return or expulsion of refugees) under Article 33 of the United Nations Convention,[2] thus § 243(h) remained in force as it had been under previous law. *Stevic,* 467 U.S. at 421, 427-428.

In contrast to the minor clarification made to § 243(h), the Refugee Act of 1980 repealed the predecessor refugee admissions statute, § 203(a)(7), 8 U.S.C. § 1153(a)(7) (1976),[3] and replaced it with two new provisions: § 207,

[1]Withholding of deportation under § 243(h) has existed in various forms since 1950. *See, Stevic* 467 U.S. at 424-415. It is available only before an immigration judge to an otherwise deportable alien who demonstrates a clear probability of persecution in his or her home country. *Id.* at 430. When granted, withholding of deportation merely results in a temporary bar on deportation to the specific country where persecution is likely to occur. The Immigration and Naturalization Service (hereinafter "INS") is free to enforce departure to another country if it can be arranged, or to that same country if conditions change. *See Matter of Lam,* 18 I.&N. Dec. 15 (BIA 1981).

[2]In 1968, the United States acceded to the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, [1968] 19 U.S.T. 6223, T.I.A.S. No. 6577, (hereinafter the "Protocol"). The Protocol bound parties to comply with the substantive provisions of Article 2 through 34 of the United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (July 28, 1951) (hereinafter the "Convention").

[3]Section 203(a)(7), 8 U.S.C. § 1153(a)(7) (1976), provided 17,400 immigrant visas per year to refugees fleeing from Communist-dominated countries or areas in the Middle East "because of persecution or a fear of persecution on account of race, religion or political opinion." Applications were made to the district director, and neither immigration judges nor the Board had jurisdiction over such claims. *Stevic,* 467 U.S. at 415-416 and n. 8.

which provides for the admission of refugees from abroad and § 208, which for the first time established a statutory mechanism for the admission of refugees at or inside our borders. *See* 8 U.S.C. §§ 1157, 1158 (1982). S. Rep. No. 256, 96th Cong., 1st Sess. 9 (1979); H.R. Rep. No. 608, 96th Cong., 1st Sess. 17-18 (1979). Both refer in specific terms to a new definition of refugee contained in § 101(a)(42)(A), which provides as the operative standard, "persecution or a *well-founded fear* of persecution." (emphasis added). 8 U.S.C. § 1101(a)(42)(A) (1980).

Although there is no textual basis for its claim, Petitioner here asserts that the well-founded fear of persecution standard for asylum should be equated with the clear probability standard for withholding under § 243(h). An established canon of statutory construction admonishes that the starting point in every case is the language employed by Congress in the statute itself. *INS v. Phinpathya,* 464 U.S. 183, 189 (1984). In the absence of a clearly expressed Congressional intent to the contrary, the language of a statute must ordinarily be regarded as conclusive. *Consumer Product Safety Com'n v. GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980). Under this criterion alone, the Petitioner's position can be completely dismissed.

Although Congress clearly intended that the well-founded fear of persecution standard be applied to the new asylum provision in § 208, it significantly did not change the withholding of deportation provision of § 243(h) to incorporate the well-founded fear language when the Refugee Act of 1980 was enacted. *INS v. Stevic,* 467 U.S. 407, 423-424. From the plain language of the Act, "well-founded fear" applies to asylum under § 208 but does not apply to § 243(h) withholding. *Id.*

The well-founded fear standard is not specifically defined or described elsewhere in the legislation.[4] But where a term used in a statute is not specifically defined, the Court is "compelled to start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." *Russello v. United States,* 464 U.S. 16, 21 (1983) quoting *Richards v. United States,* 369 U.S. 1, 9 (1962). *See also, Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 198-199 (1976) (specifically rejecting the addition of "a gloss to the operative language of the statute quite different from its commonly accepted meaning").

The Oxford English Dictionary defines "well-founded" in regard to "a belief, sentiment or statement: [h]aving a foundation in fact; based on good or sure grounds or reasons." 12 Oxford English Dictionary, Sec. W, at 295 (1933). Taking the plain language of the two statutes, the Court of Appeals concluded that the "difference in language . . . makes [the] contrast between the two tests apparent." *Cardoza-Fonseca v. INS,* 767 F.2d 1448, 1452 (9th Cir. 1985). *See also Bolanos-Hernandez v. INS,* 767 F.2d 1277, 1282-1283 (9th Cir. 1984) (difference in language between section 243[h] and section 208 strongly supports the conclusion that the standard under the latter is more liberal).

The plain language of § 243(h) is in sharp contrast to the well-founded fear provision of the asylum statute. Section 243(h) does not use the term "refugee", nor refer to § 101(a)(42)(A); it does not incorporate by reference nor specifically mention the well-founded fear of persecution language. By the very terms of the statute, withholding of deportation is available only if the alien's life or freedom

[4]Although the well-founded fear standard is not specifically defined, Congress has directed that this section was to be "construed consistent with the Protocol," from which the language was adopted. S.Rep. No. 590, 96th Cong., 2d Sess. 20 (1980).

"would" be threatened, but not if the alien only shows he or she "could" be subject to persecution. Well-founded fear, by its plain language, connotes a lesser degree of certitude than the "more likely than not" level of certainty that the Court has held applies to the withholding of deportation statute.

Due to these significant differences, this Court in *Stevic* found "no textual basis in the statute for concluding that the well-founded fear of persecution standard is relevant to a withholding of persecution claim under § 243(h). *INS v. Stevic,* 467 U.S. 407, 423-424 (1984). Respondent submits that the converse of this observation is also true, i.e., there is no textual basis in the statute for concluding that the clear probability standard is relevant to an application for asylum under § 208.

Congress explicitly incorporated the well-founded fear language into § 208 (asylum) but not into § 243(h) (withholding). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States,* 464 U.S. 16, 23 (1983), quoting *United States v. Wong Kim Bo,* 472 F.2d 720, 722 (5th Cir. 1972).

Petitioner boldly asserts that this difference in terminology does not reflect that Congress intended to create a substantively different standard for the newly-established asylum statute. Pet. Brief at 23. However, a meaning different from the one actually expressed in the chosen language of a statute should not be incorporated casually; Congress is presumed to have utilized specific language appropriate for the meaning it intended when drafting a statute. *Haynes v. United States,* 390 U.S. 85, 92 (1968). If, as Petitioner suggests, the "ordinary meaning of the words used"

is not to be applied, an explicit statement of congressional intent in the legislative history in that regard is required. *See INS v. Phinpathya,* 464 U.S. 183 (1984). No such explicit statement can be found.

B. Petitioner's Position Is Incompatible With The Legislative Scheme Of The Refugee And Asylum Provisions Of The Immigration And Nationality Act.

The entire legislative scheme reflects Congress' desire to extend uniform treatment to refugees, regardless of where they are physically situated at the time of their application. By specifying the identical well-founded fear standard of proof in § 207 (refugees processed abroad) and § 208 (asylum), Congress obviously intended to extend to refugees within our borders the same more generous standard it had historically applied to refugees who sought entrance from abroad.

Petitioner argues that Congress created the asylum provision only as a means of permitting aliens who qualify for withholding of deportation to gain lawful permanent resident status. Pet. Brief at 6. Had that been the result intended by Congress, it surely would have been simpler to amend the existing withholding provision of § 243(h) to allow a discretionary grant of lawful permanent resident status some time after the initial grant of relief. Instead, Congress made a considered decision to establish a new asylum status independent of § 243(h) withholding.

The new asylum provision was clearly different from the existing withholding of deportation relief. Aside from the different standards of proof, there are other distinct aspects to these statutory provisions. While withholding of deportation is located in Chapter 5 of the Immigration and Nationality Act which deals with deportation, the asylum provision is located with the refugee admissions pol-

icies in Chapter 1.[5] Unlike § 208 (asylum) which is discretionary, § 243(h) (withholding) is mandatory. Section 243 (h) requires a showing of threat to "life or freedom", whereas § 208 includes a broader concept of persecution. *See INS v. Stevic,* 467 U.S. 407, 421, n.15 and 428-429, n.22 (1984). Furthermore, asylum can be sought administratively from the INS district director, while withholding is exclusively a deportation relief. Once granted, asylum qualifies an alien for lawful permanent resident status while withholding does not. *See* 8 C.F.R. § 208.9.

Congress has established two different statutes with two different roles in the legislative scheme. Thus it is apparent that Petitioner's analysis which equates these two different statutes is fundamentally flawed.

II.

THE ORIGINS AND LEGISLATIVE HISTORY OF § 208 DEMONSTRATE THAT CONGRESS INTENDED TO RETAIN A MORE GENEROUS STANDARD OF PROOF FOR REFUGEES.

A. Congress Specifically Intended To Establish An Asylum Provision Which Incorporates The Well-Founded Fear Standard Of Proof Derived From The Internationally Accepted Definition Of Refugee.

The Refugee Act of 1980 was an expansive piece of legislation designed to reflect one of America's oldest themes—the welcome of homeless refugees to our shores—and to incorporate our national commitment to human rights and humanitarian concerns. S. Rep. No. 256, 96th Cong., 1st Sess. 1 (1979); H.R. Rep. No. 608, 96th Cong., 1st

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[5]Petitioner also ignores the fact that its position would dramatically change the standard for refugee admissions from abroad under § 207, to which the well-founded fear standard also applies. This would be contrary to the long-established history of a liberal standard for refugee admissions. See brief of amici curiae, The International Human Rights Law Group and Washington Lawyers Committee for Civil Rights Under Law.

Sess. 2 (1979). The legislative history of The Refugee Act shows unequivocally that Congress intended to codify our country's adherence to the United Nations Convention and Protocol when drafting the new asylum provision.[6] Therefore, in selecting the same well-founded fear definition of refugee as the underlying criterion for eligibility for both § 207 (refugee admissions from abroad) and § 208 (asylum), Congress chose the definition from the Convention and Protocol and specifically directed that the provision be interpreted consistently with the Protocol. S. Rep. No. 590, 96th Cong., 2d Sess. 20 (1980); S. Rep. No. 256, 96th Cong., 1st Sess. 14-15 (1979); H.R. Rep. No. 608, 96th Cong., 1st Sess. 9 (1979). The legislative history of the Refugee Act of 1980 is also replete with criticism of the ideological and geographic limitations of the prior law governing refugees, and their elimination was considered a significant expansion in our law.[7]

Congress recognized that the United States had conformed its treatment of refugees with the requirements of

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[6]In Article I, ¶ 2, the Protocol adopts the well-founded fear standard of the Convention, and defines a "refugee" as an individual who

> "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

[7]H.R. Rep. No. 608, 96th Cong., 1st Sess. 9 (1979); *The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcom. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 27 (1979) (remarks of Representative Fish); *id.* at 43, 51 (testimony of Ambassador Clark, U.S. Coordinator for Refugee Affairs); *The Refugee Act of 1979: Hearings on H.R. 2816 Before Subcomm. on International Operations of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 1 (1979) (testimony of Representative Fascell); *The Refugee Act of 1979: Hearings on S 643 Before the Senate Judiciary Comm.*, 96th Cong., 1st Sess. 6 and 11 (1979) (testimony of Ambassador Clark).

the Protocol *in practice*, i.e., through the use of discretionary "parole admissions" under § 212(d)(5),[8] but not in statute.[9] Finding such an ad hoc approach to be inadequate,[10] Congress created the new asylum provision, incorporating the internationally accepted definition of refugee contained in the U.N. Protocol.

The substance of the well-founded fear standard for refugees was not specifically addressed by Congress in the

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[8]H.R. Rep. No. 608, 96th Cong., 1st Sess. 2 (1979). Parole under § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1976), was frequently utilized to admit refugees because the Executive branch found § 203(a)(7) inadequate to meet refugee crises. Section 203(a)(7)'s numerical limit of 17,400 immigrant visas was insufficient to meet the needs of deserving refugees, and its ideological and geographic restrictions (e.g., § 203(a)(7) did not apply to countries of the Western Hemisphere such as Cuba) were too limiting. The Refugee Act of 1980 maintains this parole authority, but limits it to "compelling" circumstances when § 207 cannot be used. *See* 8 U.S.C. § 1182(d)(5)(B) (1982).

[9]H.R. Rep. No. 608, 96th Cong., 1st Sess. 10 (1979); *House Hearings Before Immig. Subcomm., supra*, at 20 (testimony of Attorney General Griffin Bell); *Senate Hearings, supra*, at 11, 31 (testimony of Ambassador Clark); *id.* at 18 (testimony of Michael J. Egan, Associate Attorney General). Similarly, when the United States acceded to the United Nations Protocol Relating to the Status of Refugees, the President and Secretary of State advised the Senate that "[a]ccession to the Protocol would not impinge adversely upon *established practices* under existing law in the United States." S. Exec. Doc. K, 90th Cong. 2nd Sess. III, VII (1968) (emphasis added). This constitutes a recognition that neither the Convention nor the Protocol require the *admission* of any refugee by a contracting party, but only the guarantee of *non-refoulement*. *See* Article 33, U.N. Convention on the Status of Refugees; *INS v. Stevic*, 476 U.S. 407, 428, n. 22 (1984).

[10]Congress was dissatisfied with the absence of uniform treatment for refugees, which resulted in some being granted parole while others received "indefinite voluntary departure". In discussing the past statuses given to persons who qualified under the United Nations Convention and Protocol, Congress significantly did not mention withholding of deportation as a status which was applicable to refugees under prior practice, but only individual parole and "indefinite voluntary departure". S.Rep. No. 256, 96th Cong., 1st Sess. 9 (1979). Clearly Congress did not consider that withholding under § 243(h) addressed this problem.

legislative history of the Refugee Act, beyond emphasizing that it conform to the United Nations' definition. S. Rep. No. 256, 96th Cong., 1st Sess. 4 (1979); H.R. Rep. No. 608, 96th Cong., 1st Sess. 9 (1979). In none of the more than 1500 pages of testimony, statements, reports, and discussions which comprise the legislative history was the narrow issue raised in this case specifically addressed.[11] However, the scheme of the Refugee Act and the legislative history strongly support the conclusion that Congress intended the well-founded fear standard for the new asylum statute to be distinct from and "more generous" than the clear probability standard for withholding.[12]

Petitioner attempts to use legislative history to support its assertion that, as with § 243(h), the legislation did not change the standard for asylum. Pet. Brief at 26-27. The Petitioner relies on the fact that in 1974, the Attorney

[11]While there was discussion of the definition of refugee in the legislative history, it focused on another aspect of the refugee definition, that is, the elimination of the ideological and geographic restrictions which existed under our previous law. S.Rep. No. 256, 96th Cong., 1st Sess. 4 (1979); H.R. Rep. No. 608, 96th Cong., 1st Sess. 9 (1979).

[12]The Senate bill, S.643, 96th Cong., 1st Sess. (1979) expressly provided that an alien could not obtain asylum unless "his deportation or return would be prohibited under § 243(h)." 125 Cong. Rec. 23253 (1979). The House bill, which did not contain this language (*id* at 37244), was adopted instead. Petitioner concedes that had the Senate bill been enacted, the issue here would be unequivocally resolved. However, Petitioner attempts to minimize the significance of the choice of the House bill by claiming no substantial difference between the two provisions exists since the import of the different language was not discussed in the conference report. (*See* Pet. Brief at 15-16, n.10). Such an assertion turns logic upside down, as Congress surely would not have chosen to delete the specific language it intended to be operative. Moreover, Petitioner's interpretation of this action is contrary to established principles of statutory construction. Where such a specific choice of drafting is made, "it strongly militates against a judgment that Congress intended a result that it expressly declined to enact." *Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186, 200 (1974). *See also, Russello v. United States*, 464 U.S. 16, 23 (1983).

General promulgated regulations for an administrative form of relief called "asylum".[13] The Petitioner's assertion must fail, because it overlooks a crucial point: Congress repeatedly emphasized that no uniform practice had theretofore existed for the treatment of refugees under the United Nations definition. S. Rep. No. 256, 96th Cong., 1st Sess. 9 (1979); H.R. Rep. No. 608, 96th Cong, 1st Sess. 2 (1979).

The regulations as amended in 1979, required aliens seeking "asylum" and withholding of deportation to show that they "would be subject to persecution" on one of the enumerated grounds. *See* 8 C.F.R. § 108.3(a) (1980) (asylum), and 8 C.F.R. § 242.17(c) (1980) (withholding of deportation). Thus, the Petitioner claims that Congress intended to silently ratify this concept of a single standard of proof in the Refugee Act of 1980. *See* Pet. Brief at 17-18. *See also, Matter of Acosta*, Int. Dec. 2986, at 26-27 & n.13 (BIA 1985).

Petitioner's argument is a perversion of the rule of construction that when Congress reenacts a statute it may be deemed to have approved of an existing administrative construction of that statute. *See generally, Helvering v. Griffiths*, 318 U.S. 371, 395-396 & n.46 (1943). First, Con-

[13]There was no statutory scheme for asylum before 1980, but in 1974 (lasting effect until 1980), the Attorney General promulgated regulations for an administrative form of relief called "asylum". *See* 8 C.F.R. §§ 108.1, 108.2 (1976). Determination of eligibility was made by the district director in the exercise of discretion. The decision could not be reviewed by an immigration judge or by the Board, until the regulations were amended in 1979. *See* 44 Fed. Reg. 21253, Apr. 10, 1979 (effective May 10, 1979); 8 C.F.R. §§ 108.3(a) and (b) (1980). As initially promulgated, this provision did not contain a standard of proof. *See INS v. Stevic*, 467 U.S. 407, 420 n.13 (1984); *Carvajal-Munoz v. INS*, 743 F.2d 562, 575 n.15 (7th Cir. 1984). These regulations were repealed following the enactment of the Refugee Act of 1980 as "no longer applicable". 46 Fed. Reg. 45117 (Sept. 10,

gress did not here reenact the statute. While the Refugee Act merely changed § 243(h) from discretionary to mandatory, the asylum provision § 208 was entirely new. This new provision specified that applicants for asylum must prove a "well-founded fear of persecution", 8 U.S.C. § 1101(a)(42)(A), language which had never before been incorporated into United States statutory law.

Second, this Court has often criticized the concept of silent ratification. *See, e.g., Girouard v. United States,* 328 U.S. 61, 69 (1946) ("It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law"). More than mere silence in reenactment has been required, e.g. "persuasive circumstances evidencing a clear design that congressional inaction be taken as acceptance", *Boys Markets, Inc. v. Retail Clerks' Union,* 398 U.S. 235, 242 (1970), or a showing that the attention of Congress was specifically directed to the matter at hand. *Helvering v. Hallock,* 309 U.S. 106, 119-120 (1940). Petitioner cannot show that either of these requirements have been met.[14]

Moreover, the INS recognized that the Refugee Act had created this new and distinct standard for § 208 (asy-

[14]There was no authoritative interpretation establishing the standard to be applied to asylum requests under 8 C.F.R. § 108 when Congress was considering the Refugee Act of 1980. Petitioner would have the Court infer that Congress was or should have been aware of an asserted INS policy applying the clear probability standard to asylum claims based on extremely meagre evidence. Under prior law, there was no appeal of a district director's denial of asylum. *Matter of Lam,* 18 I.&N. Dec. 15, 18 n.4 (BIA 1981). Therefore, no standard was discussed in case law, nor was it specified in the pre-1979 regulations. The first mention of any standard applicable to asylum claims was in the April, 1979 regulations, which required only that an alien prove that he or she "would be persecuted." *See* 8 C.F.R. § 108.3(a) (1980). In the introductory remarks to the regulations, the INS in a short and somewhat cryptic statement attempts to equate the well-founded fear and clear probability standards. *See* 44 Fed. Reg. 21253, 21257 (1979). There is no evidence, however, that Congress was aware of or intended to ratify this one comment at the time it enacted the Refugee Act.

lum) and promulgated new regulations to require that applicants for asylum show a "well-founded fear of persecution." *Compare* 8 C.F.R. § 108.3(a) (1980), repealed as "no longer applicable", 46 Fed. Reg. 45117 (Sept. 10, 1981), *with* 8 C.F.R. § 208.5 (1981). Significantly, the INS did not alter the standard in the regulations for § 243(h). *Compare* 8 C.F.R. § 242.17(c) (1979), *with* 8 C.F.R. § 242.17(c) (1981). In fact, the only clear statement in the legislative history regarding the INS's pre-Refugee Act asylum regulations was Senator Kennedy's statement, made on the floor of the Senate the day it voted on the bill, to the effect that the "[p]resent [asylum] regulations and procedures now used by the Immigration Service *simply do not conform* to either the spirit or to the new provisions of this Act." 126 Cong. Rec. S1754 (daily ed. Feb. 26, 1980) (emphasis added). Far from showing that Congress intended to adopt existing regulatory practice, this history demonstrates a conscious choice to alter the statutory scheme.

Petitioner's interpretation is inconsistent with the fact that the new asylum provision incorporated a definition of refugee which contained a standard of proof different from the preexisting standard of § 243(h). The clear intent of Congress was that asylum status conform to the definition of refugee contained in the United Nations Convention and Protocol. "[T]he new definition . . . will finally bring United States law into conformity with the internationally accepted definition of the term 'refugee'." H.R. Rep. No. 608, 96th Cong., 1st Sess. 9 (1979).

It is well established that a statute should be interpreted in light of Congress' overriding objective for the enactment. *See e.g. Consumer Product Safety Com'n v. GTE Sylvania, Inc.,* 447 U.S. 102 (1980). Especially where, as here, Congress did not directly address a specific issue of statutory construction, the overall purpose and structure of

a statute becomes far more important as an indicator of legislative intent. *See e.g., Russello v. United States,* 464 U.S. 16 (1983); *Ernst & Ernst v. Hochfelder,* 425 U.S. 185 (1976). Since it is abundantly clear from the legislative history that the general purpose of the Refugee Act of 1980 was to conform our law with that of the U.N. Convention and Protocol, this intent must control. To interpret this provision in any other way flies in the face of an unequivocal expression of Congressional intent.

B. Historically, Congress Has Always Provided A Liberal Standard For The Admission Of Refugees.

Making asylum available on a lesser showing of persecution, but as a matter of discretion, is consistent with its origins. The enactment of § 207 and § 208 with a concomitant requirement of meeting the same definition of refugee provided in § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A), demonstrates that the asylum provision of § 208 has an origin identical to the refugee provision of § 207. *See* S. Rep. No. 256, 96th Cong., 1st Sess. 15 (1979); H.R. Rep. No. 608, 96th Cong., 1st Sess. 29 (1979). Those origins are the humanitarian efforts to resettle groups traditionally admitted from abroad prior to 1980, such as Russian Jews, Cubans, Chinese, and Southeast Asian refugees.

A generous and humanitarian standard for refugee admissions has been a part of U.S. law since the end of World War II. *See generally,* H.R. Rep. No. 608, 96th Cong., 1st Sess. 2-5 (1979). The roots of § 207 and § 208 can be traced back to the 1946 Constitution of the International Refugee Organization, 62 Stat. 3037 (1946) (hereinafter the "IRO").[15] *See INS v. Stevic,* 467 U.S. 407, 415 (1984), quoting *Rosenberg v. Yee Chien Woo,* 402 U.S. 49, 52

[15]For a thorough discussion of this history see, *generally,* Cox, *"Well-Founded Fear of Being Persecuted": The Sources and Application of a Criterion of Refugee Status.* 10 Brooklyn J. of Int'l. Law 333, 337-352 (1984).

(1971). The IRO definition of refugee was the "point of departure" for the drafters of the 1951 U.N. Convention. *Summary Record of the Ad Hoc Committee on Statelessness and Related Problems,* U.N. Doc. E/AC. 32/SR.5 at 4.[16] The IRO defined refugees as persons who expressed "valid objections" to returning to their country of nationality. Such valid objections included "[p]ersecution, or fear, based on *reasonable grounds* of persecution because of race, religion, nationality or political opinions . . ." (emphasis added). IRO Constitution, § C, subsection 1(a)(i).

This became part of U.S. law when Congress explicitly adopted the IRO definition of the terms "displaced person" and "refugee" in the Displaced Persons Act of 1948, Pub.L. No. 80-774, 62 Stat. 1009, § 2(b) (1948). The Act included, for the first time, a "fear of persecution" standard for refugees. *Id* at § 7. This standard was interpreted by the courts as requiring "some reasonable basis to fear persecution." *Lavdas v. Holland,* 235 F.2d 955 (3d Cir. 1956); *Accord, United States ex rel Fong Foo v. Shaughnessy,* 234 F.2d 715, 718 n.2 (2d Cir. 1955).

After the Displaced Persons Act expired, Congress enacted the Refugee Relief Act of 1953, Pub.L. No. 203, 67 Stat. 400 (1953), which retained the "fear of persecution" standard. *Id.* at § 2. This standard was construed liberally by the courts and "in sharp contrast" to the stringent withholding of deportation provision. *See Cheng Fu Sheng v. Barber,* 269 F.2d 497, 499-500 (9th Cir. 1959). The "Refugee-Escapee Act" enacted in 1957 again retained the "fear of persecution" standard. Pub.L. No. 85-316, § 15(c)(1), 71 Stat. 643 (1957).

[16]Even today, the INS continues to recognize that "[t]he term refugee also applies to any person who has been considered a refugee under . . . the Constitution of the International Refugee Organization." *See,* Instructions to the INS "Application For Issuance or Extension of Refugee Travel Document" (Form I-570).

In response to the 1956 Hungarian crisis, Congress enacted the "Fair Share Act", which expanded the use of the parole power, § 212(d)(5), 8 U.S.C. § 1182(d)(5), in order to accommodate large influxes of refugees on an emergency basis. Pub.L. No. 86-648, 74 Stat. 504 (1960). One of the eligibility criteria for this Act was that the refugee had to be "within the mandate of the United Nations High Commissioner for Refugees (hereinafter "UNHCR"). *Id.* at § 1. Thus Congress explicitly adopted the liberal UNHCR standard for refugees in this law.

In 1965, Congress enacted § 203(a)(7) of the Immigration and Nationality Act, again incorporating a liberal "fear of persecution" standard into the definition of "refugee". *See* amendments to the Immigration and Nationality Act, Pub.L. No. 89-236, § 3, 79 Stat. 911 (1965).

The Board of Immigration Appeals repeatedly held that § 203(a)(7) required the alien to prove a "good reason" to fear persecution, a more lenient standard than the standard for withholding under § 243(h). *See Matter of Janus and Janek,* 12 I.&N. Dec. 866, 876 (BIA 1968); *Matter of Tan,* 12 I.&N. Dec. 564, 569-570 (BIA 1967). *Accord, Matter of Ugricic,* 14 I.&N. Dec. 384, 385-386 (Dist. Dir. 1972); *Matter of Adamska,* 12 I.&N. Dec. 201, 202 (Reg. Comm'r 1967).

In contrast, the history behind § 243(h) is one of strict burdens, at one point requiring a showing of actual physical persecution. *See, e.g., Blazina v. Bouchard,* 286 F.2d 507, 511 (3d Cir. 1961); *see, generally, Kovac v. INS,* 407 F.2d 102 (9th Cir. 1969). Moreover, the clear probability standard, applicable to § 243(h) for many years, was unchanged by the Refugee Act of 1980. *INS v. Stevic* 467 U.S. 407, 430 (1984).

However, when Congress repealed § 203(a)(7) in 1980 and replaced it with § 207 (overseas refugee admissions)

and § 208 (asylum applicants), Congress explicitly retained a liberal "fear of persecution" standard in the definition of refugee. Section 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (1982). *See* H.R. Rep. No. 608, 96th Cong., 1st Sess. 3 (1979) ("This was the origin of the definition of 'refugee' which exists under current law in section 203(a)(7) of the Immigration and Nationality Act").[17] This definition is merely the great grandchild of the original IRO definition which required "reasonable grounds" of persecution. This evolutional analysis is confirmed by the legislative history of the U.N. Convention. According to the drafters of that document:

> The expression "well-founded fear of being the victim of persecution for reasons of race, religion, nationality or political opinion" means that a person has either been actually a victim of persecution or *can show good reason why he fears persecution.* (emphasis added)[18]

Thus, given the separate history of § 208, its humanitarian origins, and the legislative history of the Refugee Act of 1980, it is clear that the well-founded fear standard for refugee admissions is more generous than the clear probability standard for § 243(h) withholding of deportation.

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[17]Thus, "the substantive standard remains unchanged". S. Rep. No. 256, 96th Cong., 1st Sess. 9 (1979). Asylum will continue to be granted only to those who meet the "good reason" to fear persecution standard which governed § 203(a)(7). *See* INS Operations Instruction 208.4 (November 11, 1981), which provides:

> The burden is on the asylum applicant to establish . . . a well-founded fear of persecution. . . . This means that the applicant must have actually been persecuted or can show *good reason why he/she fears persecution.* (emphasis added.)

(Reprinted in 4 Gordon & Rosenfeld, *Immigration Law and Procedure* (1986) at 23-156.14.

[18]United Nations Economic and Social Counsel, *Report of the Ad Hoc Committee on Statelessness and Related Problems* at 39 (Feb. 17, 1950) (E/1618; E/AC 32/5). *See also,* U.N. *Handbook* at ¶ 45.

III.

THE NINTH CIRCUIT'S CONSTRUCTION OF THE WELL-FOUNDED FEAR STANDARD CONFORMS TO THE UNITED NATIONS DEFINITION OF REFUGEE, IS WORKABLE, AND DOES NOT BURDEN THE AGENCY.

A. The Petitioner's Position Finds No Support From The Analysis Of The Statutory Text Conducted By This Court In INS. v. Stevic.

Despite differences in purpose, statutory language, and legislative history, the Petitioner argues that there is an identical legal standard for claims under § 208 and § 243(h), claiming that both require a "more likely than not" or "clear probability" type of analysis.[19] The Petitioner's position finds no support from this Court's decision in *INS v. Stevic,* 467 U.S. 407 (1984).

The Court's analysis in *Stevic,* which carefully distinguished between requests for asylum under § 208 and requests for withholding of deportation under § 243(h), is instructive in this case. Stevic argued that he was eligible for withholding of deportation upon establishing a well-founded fear of persecution. The Court disagreed, first observing that in order to be eligible for § 208 (asylum), an alien in the United States must meet the definition of refugee contained in § 101(a)(42)(A) of the Act. The Court further pointed out that § 243(h) does not refer to § 101(a)(42)(A), does not use the term "well-founded fear," nor refer to "refugees" or "asylees".

[19]Petitioner relies heavily in its brief on the Board's decision in *Matter of Acosta,* Int. Dec. No. 2986 (BIA 1985). In *Acosta,* the Board erroneously concludes that the two standards are "not meaningfully different", *id.* at 25, by completely ignoring the different purpose and history of § 208 and § 243(h). This fundamental assumption which underlies its decision undercuts the Board's reasoning and holding. Through its blurring of the two standards in order to maintain its preferred "clear probability" approach to asylum claims, the Board has frustrated Congress' clear desire to conform U.S. law with the more generous United Nations definition of the term "refugee."

For the purpose of its analysis in *Stevic,* the Court assumed that the "well-founded fear" standard is "more generous" than the "clear probability" standard. *Stevic,* 467 U.S. at 425. In several passages the Court implied that the "well-founded fear" standard is different and less rigorous than the "clear probability" standard:

> [I]t seems clear that Congress understood that refugee status alone did not require withholding of deportation, but rather, the alien had to satisfy the standard under § 243(h) . . . The Court of Appeals' decision rests on the mistaken premise that every alien who qualifies as a "refugee" under the statutory definition is also entitled to a withholding of deportation under § 243(h). *Id.* at 428.
>
> The Court of Appeals granted respondent relief based on its understanding of a standard which, even if properly understood, does not entitle an alien to withholding of deportation under Section 243(h). *Id.* at 430.

It is apparent from these statements that even if an alien qualifies as a refugee, that is not enough to prove a § 243(h) claim. In other words, demonstrating a well-founded fear of persecution does not necessarily establish a clear probability of persecution, but by definition, is sufficient to qualify for § 208 asylum.

B. The More Moderate Position On Well-Founded Fear Recognized By This Court In Stevic And Applied By The Ninth Circuit Is Consistent With The United Nations Definition.

Since the *Stevic* decision, several circuit courts have decided that this Court's assumption in *Stevic,* that the well-founded fear standard is "more generous" than the clear probability standard, was a correct one. *See Guevara-Flores v. INS,* 786 F.2d 1242 (5th Cir. 1986); *Bolanos-Hernandez v. INS,* 767 F.2d 1277, 1282-1283 (9th Cir. 1984); *Youkhanna v. INS,* 749 F.2d 360, 362 (6th Cir. 1984); *Carvajal-Munoz v. INS,* 743 F.2d 562, 573-575 (7th

Cir. 1984). *Contra, Sotto v. INS*, 748 F.2d 832, 836 (3d Cir. 1984).

Although this Court has not yet defined the meaning of the well-founded fear standard, this Court observed in *Stevic* that:

> A more moderate position is that so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility. 467 U.S. at 424-425.

This position is the fair, realistic, and humanitarian standard for asylum applicants that was originally envisioned by Congress in the Refugee Act of 1980. The Ninth Circuit Court of Appeals has expressly adopted this interpretation of "well-founded fear," requiring a showing of a "reasonable possibility" of persecution. *See Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1283 (9th Cir. 1984). The Seventh Circuit has done the same. *See Carvajal-Muroz v. INS*, 743 F.2d 562, 574 (7th Cir. 1984).

The well-founded fear standard is not a new legal standard.[20] It originally appeared in Article 1 of the 1951 United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (July 28, 1951) and has been interpreted by various foreign governments who are signatories to either the 1951 U.N. Convention or 1967 Protocol Relating to the Status of Refugees. *See* brief of amicus curiae, The Lawyers Committee for Human Rights.

The factors recognized by the United Nations as relevant to what constitutes a "well-founded fear of persecution" are particularly significant here because Congress specifically passed the Refugee Act of 1980 with the intent

[20]For the history of the well-founded fear standard, see briefs of amici curiae, United Nations High Commissioner for Refugees, and The International Human Rights Law Group and Washington Lawyers Committee for Civil Rights Under the Law.

of bringing United States statutory provisions concerning refugees into conformity with the provisions of the United Nations Protocol. *See* S. Rep. No. 256, 96th Cong., 1st Sess. 4 (1979); H.R. Rep. No. 781, 96th Cong., 2d Sess. 19, 20 (1980).

Thus, in recognition of Congress' express desire to adopt the U.N. Convention's definition of "refugee," the Court of Appeals has appropriately looked to the U.N. interpretation of the key elements of the definition. *See Hernandez-Ortiz v. INS*, 777 F.2d 509, 513 (9th Cir. 1985); *Garcia-Ramos v. INS*, 775 F.2d 1370, 1373 (9th Cir. 1985).

A standard which requires credible evidence of a *reasonable* fear of persecution such as that adopted by the Ninth and Seventh Circuits, is consistent with the interpretation by the United Nations High Commissioner For Refugees (UNHCR) in the U.N. *Handbook*.[21] As explained in the *Handbook*, "well-founded fear" is not a purely objective standard that relies on balancing probabilities. Rather, it requires a combined analysis of the subjective fear and the objective reasonableness of the fear:

[21]The UNHCR is charged with the responsibility of supervising the application of the provisions of the U.N. Convention and Protocol Relating to the Status of Refugees. See Article 35 of the 1951 U.N. Convention and Article II of the 1967 U.N. Protocol.

The UNHCR has published the *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, (Geneva, 1979). Each country may decide whether a particular applicant has sustained his or her burden. But this fact has no bearing on the substantive nature of the burden itself. The *Handbook* has been accepted by both the BIA and the courts as a significant source of guidance as to the meaning of the Protocol. *Matter of Rodriguez-Palma*, 17 I.&N. Dec. 465, 468 (BIA 1980); *Matter of Frentescu*, 18 I.&N. Dec. 244, 246 (BIA 1982); *Hernandez-Ortiz v. INS*, 777 F.2d 509, 514, n. 3 (9th Cir. 1985); *Ananeh-Firempong v. INS*, 766 F.2d 621, 626 (1st Cir. 1985); *Carvajal-Munoz v. INS*, 743 F.2d 562, 574 (7th Cir. 1984).

37. The phrase "well-founded fear of being persecuted" is the key phrase of the definition. . . . Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. Determination of refugee status will therefore primarily require an evaluation of the applicant's statements rather than a judgment of the situation prevailing in his country of origin.

38. To the element of fear—a state of mind and a subjective condition—is added the qualification "well-founded." This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. *The term "well-founded fear" therefore contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration.* (emphasis added).

43. These considerations *need not necessarily be based on the applicant's own personal experience. What, for example, happened to his friends and relatives and other members of the same racial or social group may well show that his fear that sooner or later he also will become a victim of persecution is well-founded* . . . . The situation of each person must, however, be assessed on its own merits. In the case of a well-known personality, the *possibility* of persecution may be greater than in the case of a person in obscurity. (emphasis added).[22]

The Protocol's burden of proof, therefore, emphasizes the fear of the applicant and is satisfied if the applicant is able to prove by credible evidence that his or her fear of persecution is reasonable. The UNHCR indicates that the proper focus of an asylum examiner's inquiry should be on the reasonableness of the fear, not on a weighing of

[22]U.N. *Handbook*, ¶¶ 37, 38 and 43. *See also*, U.N. *Handbook*, ¶¶ 39-42; and *generally* Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9, 66-67 (1981).

probabilities.[23] Since decisions on asylum have the potential for determining the life or death of a person, an asylum decision cannot be made to depend on the odds of persecution, especially in light of the difficulty a refugee has in producing tangible proof of future persecution. *See* U.N. *Handbook* at ¶¶ 196, 197. *See also* brief of amicus curiae, The Lawyers Committee for Human Rights.

Thus, proving a well-founded fear of persecution requires that an applicant demonstrate a reasonable basis to fear persecution. The reasonableness of the fear is evaluated by considering a totality of the circumstances, including a subjective and objective component. The subjective component is satisfied if the fear is genuine. *Diaz-Escobar v. INS*, 782 F.2d 1488, 1492 (9th Cir. 1986). The objective component is satisfied if persecution is, in fact, a "reasonable possibility." In determining whether persecution is a reasonable possibility, the alien's experience prior to coming to this country, the conditions in the alien's country of origin, its laws, and the experience of others are relevant. *Hernandez-Ortiz v. INS*, 777 F.2d 509, 513 (9th Cir. 1985); *Garcia-Ramos v. INS*, 775 F.2d 1370, 1374 (9th Cir. 1985).

The well-founded fear standard cannot be reduced to an analysis based on predicting certainties or forecasting probabilities. It is often the case that bona fide asylum applicants lack concrete evidence of their claims. A "more likely than not" or a preponderance of the evidence standard may be proper in an ordinary civil suit where

[23]One leading scholar has stated that a "balance of probability" test is inappropriate for determining refugee status and recommends a "lesser degree of likelihood" such as a "reasonable chance" or a "serious possibility" test. G. Goodwin-Gill, *The Refugee in International Law* (1983), pp. 22-24. The UNHCR has also criticized the clear probability standard as "rather strict". Resp. App. at 1, 3.

both parties are presumed to have equal access to evidence in support of their case. But here, where people may face torture, imprisonment, or death, requiring such persons to prove that it is "more likely than not" that a future event will occur (namely their own persecution at the hands of a far away government) is a burden that most asylum applicants simply cannot hope to satisfy regardless of the true merits of their claims.[24]

The extreme difficulties most refugees would face in meeting the clear probability standard is candidly admitted in an internal study of asylum applications made by the INS itself:[25]

> "We can't make a decision solely from the evidence presented because most people can't meet the strict standards. . . I never ask a person anything. I just look and see if the person belongs to a nationality group that everyone agrees are refugees like the Poles." INS examiner, *INS Asylum Study* at 53.
>
> Admittedly, the "clear probability" standard is extremely difficult to meet. "If we used that all the time," said a district director, "no one would be given asylum." *INS Asylum Study* at 54.

The clear probability test not only fails to accurately reflect the U.N. definition of refugee due to its stringent

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[24]In light of the tremendous importance of the issues at stake in asylum cases, "the social cost of even occasional error is substantial." *Santosky v. Kramer*, 455 U.S. 745, 755 (1982). An evaluation of this societal cost provides independent support for the proposition that the standard of proof for asylum should not require a showing of clear probability of persecution. See briefs of amici curiae, American Civil Liberties Union, and American Immigration Lawyers Association.

[25]"Asylum Adjudications: An Evolving Concept and Responsibility for the Immigration and Naturalization Service" INS, Wash., D.C., June & December, 1982 (hereinafter "INS Asylum Study"). See Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. Mich. J.L. Ref. 243, 252-254 (1983-1984). Excerpts of this 93-page report have been introduced into the Congressional Record by Senator Edward Kennedy and have appeared in the press. See 129 Cong. Rec. S6035 (daily ed. May 4, 1983) and *The Boston Globe*, p. 2, May 9, 1983.

proof requirements, it also totally ignores the subjective component of the analysis emphasized in the U.N. *Handbook*.

Respondent is *not* arguing that subjective fear alone is enough to establish a well-founded fear of persecution. A fear which is "well-founded" is not a purely irrational or speculative fear. It is a genuine fear rooted in an objective reality. In order to establish that he or she has good reason to fear persecution, an alien must present *specific facts* which set forth the objective basis for the fear. *Lopez v. INS*, 775 F.2d 1015, 1016 (9th Cir. 1985); *Ananeh-Firempong v. INS*, 766 F.2d 621, 626-628 (1st Cir. 1985). Mere assertions of possible fear do not establish a well-founded fear of persecution. *Estrada v. INS*, 775 F.2d 1018 (9th Cir. 1985); *Maroufi v. INS*, 772 F.2d 597 (9th Cir. 1985); *Chatila v. INS*, 770 F.2d 786 (9th Cir. 1985); *Sagermark v. INS*, 767 F.2d 645, 649 (9th Cir. 1985); *Espinoza-Martinez v. INS*, 754 F.2d 1536 (9th Cir. 1985); *Chavez v. INS*, 723 F.2d 1431 (9th Cir. 1984); *Shoaee v. INS*, 704 F.2d 1079 (9th Cir. 1983).

Even proof of a sincere and strongly felt fear is not itself sufficient to establish an alien's eligibility for political asylum unless the fear is both subjectively genuine and objectively reasonable. *Vides-Vides v. INS*, 783 F.2d 1463, 1469 (9th Cir. 1986); *Sarvia-Quintanilla v. INS*, 767 F.2d 1387, 1394 (9th Cir. 1985). Furthermore, an applicant's testimony must be *credible* in order to establish his or her claim. *Damaize-Job v. INS*, 787 F.2d 1332 (9th Cir. 1986); *Canjura-Flores v. INS*, 784 F.2d 885, 888-889 (9th Cir. 1985); *Saballo-Cortez v. INS*, 761 F.2d 1259 (9th Cir. 1985); *Argueta v. INS*, 759 F.2d 1395 (9th Cir. 1985). Finally, generalized fears of persecution based on political upheaval, civil strife, and widespread violence affecting the general population do not constitute a well-founded

fear of persecution. *Kaveh-Haghigy v. INS,* 783 F.2d 1321, 1323 (9th Cir. 1986); *Martinez-Romero v. INS,* 692 F.2d 595, 595-596 (9th Cir. 1982).

In the decision below, the Court of Appeals discussed the type of evidence required to establish that a fear is "well-founded". The applicant must present *specific* facts establishing that he or she has actually been the victim of persecution or has some other good reason to fear persecution. Ordinarily, some objective evidence supporting the applicant's contentions must be presented. However, the court recognized that sometimes an applicant's own testimony will be all that is available. Where it is credible, persuasive, and specific, testimony alone may suffice.[26] This

[26]In formulating this approach, the Ninth Circuit referred to *Carvajal-Munoz v. INS,* 743 F.2d 562 (7th Cir. 1984). In dicta, the *Carvajal* court added a "singl[ing] out for persecution" requirement to its interpretation of the well-founded fear standard. *Id* at 574. Respondent is troubled by this phrase because it further confuses this issue. For example, the Sixth Circuit has ascribed a particularly strict and unrealistic meaning to this phrase. See *Dally v. INS,* 744 F.2d 1191, 1196 (6th Cir. 1984) and *Nasser v. INS,* 744 F.2d 542 (6th Cir. 1984). Asylum applicants cannot be expected to produce an affidavit from their persecutor. *Bolanos-Hernandez v. INS,* 767 F.2d 1277, 1285 (9th Cir. 1984) (recognizing inherent difficulties refugees have in producing independent corroborative evidence of their claims); *Zavala-Bonilla v. INS,* 730 F.2d 562, 565 (9th Cir. 1984) (striking down BIA requirement of proof of a continuous and contemporaneous cognizance of the respondent and her past activities).

The Petitioner relies on *Cheng Kai Fu v. INS,* 386 F.2d 750 (2d Cir. 1967), cert. den., 390 U.S. 1003 (1968), for the proposition that an asylum applicant must prove that he "would be singled out for persecution." Pet. Brief at 24. This would place an impermissibly strenuous gloss on proving a well-founded fear of persecution. Actually, *Cheng Kai Fu* does not even use this terminology nor stand for this proposition. All it holds is that an asylum applicant's fear must be particularized as to him in the sense that his fear must be more specific than any generalized fears of the population at large.

Respondent does not argue with the need for some sort of "particularity" requirement. Respondent agrees that "there must

(Continued on following page)

approach is correct because it reflects the U.N. interpretation of the well-founded fear standard which Congress expressly intended to incorporate into U.S. law.

C. The Well-Founded Fear Standard Adopted By The Court Of Appeals Is Neither Amorphous Nor Vague.

The Petitioner asserts that the Court of Appeals "has done little to give substance" to the legal standard in asylum cases and maligns the court for "mandating such an ill-defined standard." Pet. Brief at 29.

Petitioner's assertions are misguided. It has only been since this Court's 1984 decision in *Stevic* that Courts have begun to develop the parameters of the well-founded fear standard. This is, therefore, a situation where other

(Continued from previous page)

be some evidence that the applicant or those similarly situated are at a greater risk than the general population." *Del Valle v. INS,* 776 F.2d 1407, 1411 (9th Cir. 1985). *Accord, Vides-Vides v. INS,* 783 F.2d 1463, 1465-1467 (9th Cir. 1986); *Maroufi v. INS,* 772 F.2d 597, 599 (9th Cir. 1985); *Estrada v. INS,* 775 F.2d 1018, 1021 (9th Cir. 1985). The "singled out" language is neither necessary nor helpful to the formulation of the well-founded fear standard because it has a great potential for abuse. Immigration officers frequently have interpreted this phrase to require concrete proof that the persecutor is aware of the applicant and will be out looking for him or her. Such a heavy evidentiary burden totally fails to come to grips with the realities present in proving asylum claims. *See* U.N. *Handbook* at ¶¶ 196-197. Both the UNHCR and the Canadian government have specifically rejected this "singling out" requirement. *See* UNHCR letter dated January, 1982 (Resp. App. at 3) and Cox, *"Well-Founded Fear of Being Persecuted": The Sources and Application of a Criterion of Refugee Status,* 10 Brooklyn J. of Int'l. Law 333, 365 (1984). It has also been strongly criticized by legal commentators. *See* Blum, *The Ninth Circuit and the Protection of Asylum Seekers Since the Passage of the Refugee Act of 1980,* 23 San *Diego L.Rev.* 327, 370-373 (1986). A person who has not yet attracted the attention of his government need not wait until detection and persecution before he can claim refugee status. All the U.N. definition requires is proof that individuals similarly situated have been persecuted in the past. *See* U.N. *Handbook* at ¶ 43.

"factors remain[ ] to be developed by the gradual process of judicial inclusion and exclusion." *Rosenberg v. Fleuti,* 374 U.S. 449, 462 (1963). The Petitioner ignores the evolving case law in the Ninth Circuit, discussed above, which has defined, developed, and provided examples of the well-founded fear standard. Furthermore, it was not the Court of Appeals which "mandated" the well-founded fear standard for asylum cases; it was Congress that incorporated this United Nations definition of refugee into our laws.

Contrary to the Petitioner's view, the well-founded fear standard is not "amorphous" or "vague". (Pet. Brief at 31). All legal standards can be said to be amorphous or vague unless defined and enriched by judicial interpretation.[27] The well-founded fear standard has been defined and enriched by the U.N. *Handbook* and judicial precedent. As a legal standard it is as "workable" as the "clear probability" standard, "preponderance of the evidence" standard, "clear, convincing, and unequivocal" standard, "beyond a reasonable doubt" standard, or any other legal standard.

D. Contrary To The Government's Suggestion, The Application Of A More Generous Standard For Asylum Is, And Has Been Workable And Not Unduly Burdensome.

In attacking the application of a more generous standard for asylum than for withholding of deportation, the Petitioner maintains that the use of a lower eligibility

[27]Petitioner's attack on the linguistic precision of the standard ignores the difference in meaning and spirit Congress plainly intended to codify. "[E]ven if the particular standard-of-proof catchwords do not always make a great difference in a particular case, adopting a standard of proof is more than an empty semantic exercise . . . [because] the "standard of proof [at a minimum] reflects the value society places on individual liberty." *Addington v. Texas,* 441 U.S. 417, 425 (1979), quoting from *Tippett v. Maryland,* 436 F.2d 1153, 1166 (4th Cir. 1971) (Sobeloff, J., concurring in part and dissenting in part).

standard would be administratively unworkable. Pet. Brief at 28-32. The Ninth Circuit approach, in fact, appears to be working smoothly at both the administrative and judicial levels.[28]

Contrary to the Petitioner's suggestion, it is not difficult for a decisionmaker to apply two different standards of proof to the same set of facts or body of evidence. For example, in the San Francisco District of the Immigration Court alone, subsequent to the Ninth Circuit's application of a more generous standard for asylum, immigration judges have had little trouble denying withholding of deportation because a clear probability was not established, but granting asylum because a well-founded fear of persecution was demonstrated.[29] The Board itself has applied the two-tiered standard for asylum subsequent to the Ninth Circuit's decision in this case without procedural or sub-

[28]The Petitioner maintains that the Ninth Circuit approach would "unnecessarily require [expensive] dual adjudication of each alien's persecution claim," and is thereby unworkable. Pet. Brief at 31. This argument raises an issue that is not actually before the Court and distracts attention from the true issues in this case involving statutory language, legislative history, and the meaning of "well-founded fear." To focus on this issue, the Petitioner attacks a suggestion by the Seventh Circuit in *Carvajal-Munoz v. INS,* 743 F.2d 562, 570 (7th Cir. 1984), that asylum and withholding of deportation requests be considered in two entirely separate hearings. However, at no point has the Ninth Circuit, in this case or in any other case, made such a suggestion or adopted such a requirement.

[29]*See, e.g. Matter of Gilberto Villena-Magana,* A27 196 330-SFR (June 4, 1986); *Matter of Fernan Ortiz de Zarate,* A21 318 113-SFR (May 9, 1986); *Matter of Josepha Saenz de Cerda,* A22 810 236-SFR (May 7, 1986); *Matter of Leonidas Antonio Grimaldi,* A24 273 455-SFR (May 1, 1986); *Matter of Jose Raul Nolasco-Tejada,* A23 690 904-SFR (April 28, 1986); *Matter of Ronan Martell Lozano,* A26 360 810-SFR (March 13, 1986); *Matter of Graciela Funes-Melgar,* A24 266 006-SFR (February 12, 1986); *Matter of Jose Marco Tulio Nunez,* A24 343 657-SFR (February 11, 1986); *Matter of Joaquin Vanegas-Britos,* A23 002 429-SFR (November 14, 1985); *Matter of Ofilio Torres Hernandez,* A24 279 649-SFR (August 29, 1985).

stantive difficulties. See *Matter of Escobar and Sanchez,* Int. Dec. No. 2996 (BIA 1985).

In reviewing Board decisions involving denials of both withholding and asylum, the Ninth Circuit also does not appear to have any difficulty in applying two different standards to the same set of facts. In *Garcia-Ramos v. INS,* 775 F.2d 1370 (9th Cir. 1985), a decision which scarely takes up five pages in the Federal Reporter (including headnotes), the Court of Appeals thoroughly reviewed the evidence of persecution and agreed that a clear probability had not been established, but found that a well-founded fear existed in the evidence presented.

Furthermore, the Ninth Circuit's adoption of the more generous standard for asylum certainly has not resulted in a wholesale reversal of Board decisions denying asylum. *See Quintanilla-Ticas v. INS,* 783 F.2d 955 (9th Cir. 1986) (no well-founded fear of persecution where the alien, a former uniformed member of the military band, had resigned from the military and would no longer wear his uniform); *Larimi v. INS,* 782 F.2d 1494 (9th Cir. 1986) (no prima facie showing of well-founded fear where Iranian applicant only alleged sympathy for and casual affiliation with an organization opposed to Khomeini). *Accord, Contreras-Aragon v. INS,* 789 F.2d 777 (9th Cir. 1986); *Vides-Vides v. INS,* 783 F.2d 1463 (9th Cir. 1986); *Kaveh-Haghigy v. INS,* 783 F.2d 1321 (9th Cir. 1986); *Diaz-Escobar v. INS,* 782 F.2d 1488 (9th Cir. 1986). *See also Youssefinia v. INS,* 784 F.2d 1254 (5th Cir. 1986); *Bahramnia v. INS,* 782 F.2d 1243 (5th Cir. 1986).

Nor does the Ninth Circuit's approach require that the court review every case under both standards:

> If the BIA is correct that Diaz-Escobar failed to demonstrate a well-founded fear of persecution, we need to proceed no further because *a fortiori,* Diaz-Escobar would have failed to meet the more stringent standard of clear probability of persecution. *Diaz-Escobar,* 782 F.2d at 1492.

Thus, in every case where the well-founded fear standard is not established, the higher standard of clear probability, by definition, could not be met.

The Ninth Circuit's interpretation of the well-founded fear standard is, however, more "workable" than the vague and unhelpful language championed by the Board and Petitioner. In *Matter of Acosta,* Int. Dec. No. 2986, at 25 (BIA 1985), the Board states that its inquiry in persecution cases is "qualitative" rather than "quantitative." This standard for asylum cases is no standard at all. By hiding behind a specter of "qualitative" evidence, asylum determinations are relegated to a form of "seat of the pants" justice that has no place in the life and death arena of possible persecution. For this Court to place its imprimatur on the ill-defined position of the Board and the Petitioner as a legitimate standard of proof would render the asylum area of law a virtual guessing game of what will or will not strike the right chord with the Board. Such an approach is contrary to the intent of Congress, the statutory framework of the law, and the fundamental character of asylum.

IV.

THIS COURT SHOULD NOT DEFER TO THE BOARD'S INTERPRETATION OF THE WELL-FOUNDED FEAR STANDARD BECAUSE IT IS CONTRARY TO CONGRESSIONAL INTENT AND HAS NOT BEEN CONSISTENTLY APPLIED.

A. Requiring A Clear Probability Of Persecution For Asylum Would Frustrate The Intent Of Congress.

Petitioner argues that the Board's interpretation of the standard of proof for asylum is entitled to substantial deference from this Court (Pet. Brief at 9). However, the

Board's position that applicants for asylum under § 208 must prove a clear probability of persecution, *see Matter of Acosta,* Int. Dec. No. 2986 (BIA 1985), does not merit deference because it ignores the clear intent of Congress to require a different standard of proof for § 208 requests for asylum.

The issue in this case is entirely one of statutory construction: whether the meaning of the term "well-founded fear of persecution" used by Congress in the definition of refugee found in § 101(a)(42)(A) of the Act is distinct from the "clear probability of persecution" standard created by the Board and the Courts for proving entitlement to withholding of deportation under § 243(h). Deference to the Board is not proper here because the courts are the final authority on issues of pure statutory construction. *F.T.C. v. Colgate Palmolive Co.,* 380 U.S. 374, 385 (1965). Even where an agency has made clear its own interpretation of a statutory term, "the Court may not . . . abdicate its ultimate responsibility to construe the language employed by Congress." *Zuber v. Allen,* 396 U.S. 168, 193 (1969).

The interpretation of a statutory standard is a pure question of law which the Court must review *de novo. See Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co.,* 404 U.S. 157, 182 (1971). *See also* 5 U.S.C. § 706 (1980). Moreover, the Court may only defer to the administrative construction of a statute to the extent that it is consistent with congressional intent. *Espinoza v. Farah Manufacturing Co.,* 414 U.S. 86, 94-95 (1973). *See also Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-843 & n. 9. (1984). As argued more fully above, the Board's interpretation of the well-founded fear language frustrates the express will of Congress "to respond to the urgent needs of persons subject to persecution in their homelands." S. Rep. No. 590, 96th Cong., 2d Sess. 19 (1980).

Deference to the agency's interpretation of "well-founded fear" would also frustrate the intent of Congress to circumscribe the discretion exercised by the Executive branch in refugee policy. A recurrent theme in the legislative history of the Refugee Act of 1980 was the concern of Congress about the Executive's use of politically motivated selection criteria stemming from the unfettered discretion over refugee admissions vested in the Executive branch. *See* H.R. Rep. No. 608, 96th Cong., 1st Sess. 11 (1979). *See also* Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980,* 19 San Diego L. Rev. 9, 34, 36, 47-48, 56, 88-89 (1981).

In an effort to limit that discretion, Congress severely restricted the power of the Executive to admit refugees under the "parole" provisions of the Act, *see* 8 U.S.C. § 1182(d)(5)(B), and incorporated the nondiscriminatory and politically neutral definition of "refugee" from the U.N. Protocol. The House Committee stated its intent "to monitor closely the Attorney General's implementation of the section so as to insure the rights of those it seeks to protect." H.R. Rep. No. 608, 96th Cong., 1st Sess. 17-18 (1979).[30]

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[30]The concern of Congress over the potential for the executive branch to undermine refugee legislation through a stringent application was expressed by Congresswoman Holtzman in reference to the proposed Refugee Act of 1977, which was the genesis of the 1980 Act:

> [W]hen Congress creates a statutory scheme and does not really specify how that scheme is to be implemented it can be thwarted by the executive branch. I am concerned because although I think the definition [of refugee]in this bill is an excellent one and even though it states what person will be a refugee if he or she has a well-founded fear of persecution we don't specify how that well-founded fear is to be ascertained. . . . *Policy and Procedures for the Ad-*

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In practice, the Board's interpretation of the standard of proof has permitted the re-introduction of political bias into the process through manipulation of the standard.[31] The unreasonably high standard of proof for asylum imposed by the Board and endorsed by Petitioner has not carried out Congress' primary goal of creating fair procedures to govern the admission of refugees, *see,* S. Rep. No. 96-256 at 9, and thus is not entitled to deference.

The Refugee Act does not delegate to the Attorney General the duty to develop substantive standards for asylum. To the contrary, Congress specified the precise standard to be applied to asylum claims: the applicant must show a "well-founded fear of persecution". *See* § 101(a)(42)(A), 8 U.S.C. 1101(a)(42)(A). The authority

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mission of Refugees into the United States: Hearings on H.R. 3056 Before the House Subcom. on Immigration, Citizenship, and International Law of the Comm. on the Judiciary, 95th Cong., 1st Sess. 127 (1977).

[31]An internal study of the actual practice of the Immigration and Naturalization Service in asylum adjudications found:

> In some cases different levels of proof are required of different asylum applicants. In other words, certain nationalities appear to benefit from presumptive status while other do not.
>
> For example, for an El Salvadoran national to receive a favorable advisory opinion, he or she must have "a classic textbook case." On the other hand, BHRHA [Bureau of Human Rights and Humanitarian Affairs of the U.S. State Department] sometimes recommends favorable action where the applicant cannot meet the individual well-founded fear of persecution test. . . .
>
> Although the Refugee Act abolished the country of national origin test for refugee/asylee status, for foreign policy or other reasons the criterion may still be overriding It is unclear, however, what the statutory basis for such a determination is.

"Asylum Adjudications: An Evolving Concept and Responsibility for the Immigration and Naturalization Service," INS, Washington, D.C., June and December 1982, p. 59. *See also* Helton, *Political Asylum Under the Refugee Act of 1980: An Unfulfilled Promise,* 17 U. Mich J.L. Ref. 243, 250-254 (1983-1984).

delegated to the Attorney General under § 208 of the Act was specifically limited to the establishment of *procedures* for applying for asylum. *See* 8 U.S.C. § 1158(a). Had Congress intended to delegate to the Attorney General the authority to create a statutory asylum standard, Congress would not have specified the well-founded fear of persecution standard. Further, the authority of Congress to prescribe standards of proof in administrative proceedings is within its "traditional powers." *Steadman v. SEC,* 450 U.S. 91, 96 n. 10 (1981), quoting *Vance v. Terrazas,* 444 U.S. 252, 265 (1980).

The interpretation of the standard of proof for asylum specified under the Refugee Act must therefore be distinguished from those cases in which Congress intended to delegate to the agency the task of developing a meaning for a statutory term.[32] For example, in *INS v. Wang,* 450 U.S. 139, 145 (1981), this Court deferred to the Board's conclusion that the aliens had not met the discretionary standard for suspension of deportation. That decision, however, was based upon Congress' broad delegation to the agency of authority over that form of relief.[33] But, unlike the "extreme hardship" determination at issue in

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[32]*See, e.g., United States v. Riverside Bayview Homes,* 474 U.S. —, 88 L.Ed.2d 419, 430-31 (1985) (Court upholds agency's inclusion of adjacent wetlands within "waters" subject to the Clean Water Act citing Congress' broad definition of "waters" and the "inherent difficulties" in its precise definition); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843-844 (1984) (finding that Congress had made an express delegation of authority to the agency when it "left a gap" in the statute).

[33]The Court concluded that the Immigration and Nationality Act delegated to the Attorney General the duty to construe the "extreme hardship" requirement at issue in that case, that the Attorney General's narrow construction of that requirement was consistent with the limiting language used in that statute, and that the statute granted additional discretion because the case arose on a "motion to reopen". *Wang,* 450 U.S. 139 (1981).

Wang, whether an alien has met the definition of "refugee" (i.e., whether he or she has shown a well-founded fear of persecution) is a nondiscretionary determination. Although the Attorney General has discretion to grant or deny applications for asylum under § 208, the exercise of discretion is independent of whether the alien meets the definition of refugee. *See INS v. Stevic,* 467 U.S. 407, 423 n. 18 (1984).

Moreover, instead of leaving the well-founded fear determination to the discretion of the Attorney General, Congress specifically "intended that the language be construed consistently with the Protocol." S. Rep. No. 590, 96th Cong., 2d Sess. 20 (1980). Congress, therefore, did not delegate the definition of refugee to the Attorney General, but rather provided a distinct and judicially enforceable standard.[34] Because the issue here may only be resolved through statutory construction with reference to the legislative history of the Refugee Act and the United Nations Protocol on the Status of Refugees, the issue is squarely within the Court's competence.

B. The Board's Interpretation Of Well-Founded Fear Is Not Longstanding Nor Has It Been Consistently Applied.

Petitioner further argues that this Court should defer to the Board's interpretation of the well-founded fear standard on the ground that it is a longstanding and consistent interpretation. *See* Pet. Brief at 9-10. Petitioner asserts that the Board has consistently interpreted the standard of proof required for asylum as equivalent to that required for withholding of deportation since its decision in *Matter of Dunar,* 14 I.&N. Dec. 310 (BIA 1973). The Board's current position stated in *Matter of Acosta,* Int. Dec. No. 2986 (BIA 1985), is neither longstanding nor has it been consistently applied.

The Board's decision in *Dunar* discussed only the standard of proof for withholding of deportation under § 243(h), not the standard for asylum under § 208. Prior to the passage of the Refugee Act of 1980, the Immigration and Nationality Act did not provide for the grant of asylum nor did the term "well-founded fear of persecution" appear in the Act. In *Matter of Dunar,* 14 I.&N. Dec. 310 (BIA 1973), the Board held that the accession of the United States to the United Nations Protocol Relating to the Status of Refugees did not alter the clear probability standard of proof applied to claims to withholding of deportation under the then-existing § 243(h). As in *INS v. Stevic,* 467 U.S. 407 (1984), *Dunar* only decided the question of the burden of proof for withholding of deportation under § 243(h). Therefore, neither *Dunar* nor any other case decided prior to the addition of the asylum provision to the Act in 1980 has any bearing on the question of what Congress intended to require as proof of persecution under the new asylum provision.

Petitioner asserts that after the passage of the 1980 Refugee Act, the Board consistently held that the clear probability standard and the well-founded fear standard were identical and applied to requests for both withholding of deportation and asylum. A review of the Board's decisions, however, shows them to be far from consistent. The Board did not authoritatively discuss the issue of

[34]The Petitioner accuses the Ninth Circuit of ignoring the Board's "years of experience adjudicating persecution claims." when it refuses to adopt the Board's formulation of "well-founded fear". (Pet. Brief at 29). In doing so, the government forgets that it was not until the Refugee Act of 1980 that the Board actually had a chance to review asylum and persecution issues utilizing the well-founded fear standard for refugees of § 101(a)(42)(A) of the Immigration and Nationality Act. On the other hand, the UNHCR, whose *Handbook* has been used by the Court of Appeals, has had some 35 years of experience, and was the authority to which Congress clearly intended deference be given.

whether the burden of proof for claims under § 208 was distinct from that applied to § 243(h) requests until its recent decision in *Acosta*. Prior to its decision in *Acosta*, the Board had provided no reasoned justification for applying the clear probability of persecution standard of proof to asylum claims.[35]

Between the passage of the Refugee Act and its decision in *Acosta*, the Board vacillated between a number of formulations of the standard. *Compare Matter of Exilus*, 18 I.&N. Dec. 276, 277 (BIA 1982) (alien "must establish that he is likely to be persecuted"); *with Matter of Exame*, 18 I.&N. Dec. 303, 305 n. 4 (BIA 1982) (test for eligibility for asylum is "whether objective evidence of record is significantly probative of the likelihood of persecution . . . sufficient to establish a well-founded fear of persecution"). *Accord, Matter of Sibrun*, 18 I.&N. Dec. 354 (BIA 1983); *Matter of Leon-Orosco & Rodriquez-Colas*, Int. Dec. No. 2974 (BIA 1983, Att'y Gen. 1984) (alien must demonstrate a "realistic likelihood that he will persecuted").

At times, the Board seemed to acknowledge by its use of the disjunctive that the Refugee Act had added a new and distinct standard of proof for asylum.[36] In *Matter of Martinez-Romero*, 18 I.&N. Dec. 75, 79 (BIA 1981, *aff'd*, *Martinez-Romero v. INS*, 692 F.2d 595 (9th Cir. 1982), the Board denied the applicant's claim, ex-

[35]Where the Board did assert that the clear probability standard applied to requests for asylum, it merely cited *Dunar*, which, as discussed above was never controlling on that issue. *See, e.g., Matter of Martinez-Romero*, 18 I.&N. 75, 78 (BIA 1981).

[36]The Ninth Circuit has noted in upholding pre-*Acosta* denials of asylum and withholding of deportation that the Board's decision recognized the existence of two distinct standards. *See Vides-Vides v. INS*, 783 F.2d 1463, 1468 (9th Cir. 1986); *Quintanilla-Ticas v. INS*, 783 F.2d 955, 957 (9th Cir. 1986).

plaining that the evidence offered "does not tend to establish that she would be persecuted or that she has a well-founded fear of persecution". *See also, Matter of Portales*, 18 I.&N. Dec. 239, 241 (BIA 1982) ("alien must demonstrate a clear probability that he will be persecuted . . . or a wellfounded fear of such persecution"). The obvious implication of phrasing the burden of proof in the alternative, as seen in *Martinez-Romero* and *Portales*, is that one is different from the other.

Moreover, the actual practice of the Immigration and Naturalization Service (INS) and the Department of State in this period of time belies the Petitioner's claim that the Board in *Acosta* was merely re-affirming its prior position that the standards were identical. The Immigration and Naturalization Service's own internal study reveals that the INS attorneys responsible for asylum cases belive that the two standards are significantly different:

> The "clear probability" standard in my estimation is too high a standard, both in theory and in practice. In theory, it comes too close to "beyond a reasonable doubt." In practice, it means that unless you can present *Time* magazine articles on your own treatment, or State or the CIA has taken you under their wing, you may as well hang it up. *INS Asylum Study* at 53.
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> • • •
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> A well-founded fear of persecution seems to me to be a standard that is easier to meet, and more in keeping with the actual level of proof that a person could reasonably be expected to present. *Id.* at 55.

The State Department's "Refugee Processing Guidelines" (April 18, 1981) at p. 4, echo this more generous interpretation of the well-founded fear standard:

> The applicant need not establish that persecution occurred in the past or that persecution would actually occur if he returned to his home country. Rather, it

is only necessary that the interviewer conclude that a fear of persecution exists and is well-founded.

This agency's history of inconsistent application of the standard is not the type of settled position to which the courts defer. The doctrine of judicial deference to administrative decisions clearly does not apply to this case. The issue here is one of statutory construction, over which the courts have been given authority. *F.T.C. v. Colgate Palmolive Co.*, 380 U.S. 374, 385 (1965). Because the Board's construction of the well-founded fear standard violates both the clear language and intent of the Refugee Act, the courts may not defer to that construction. *See N.L.R.B. v. Brown*, 380 U.S. 278, 291-292 (1965). Independent judicial review is required.

V.

IT WOULD NOT BE ANOMALOUS TO MAKE ASYLUM AVAILABLE ON A LESSER SHOWING OF PERSECUTION THAN IS REQUIRED FOR WITHHOLDING OF DEPORTATION, NOR RENDER WITHHOLDING SUPERFLUOUS.

A. An Analysis Of The Statutory Structure Of The Asylum And Withholding Statutes Reveals That The Ninth Circuit's Interpretation Does Not Result In An Anomaly.

The Petitioner argues that by providing a more generous burden of proof for asylum, § 243(h) would be rendered "virtually superfluous" and that the result would be anomalous. The Petitioner would therefore apply the same standard of proof for asylum as it would for withholding.

The structure of the Immigration and Nationality Act into which § 208 asylum and § 243(h) fit is consistent with the statutory construction of the court below. Section 243(h) historically has been, and continues to be, exclusively a remedy that is available in expulsion proceedings.

On the other hand, asylum under § 208 is not exclusively a remedy, relief, or defense to deportation. Asylum is a benefit which is sought and often granted outside of the immigration court context, and which can be renewed before the court. 8 C.F.R. § 208.1 *et seq.* Renewability of asylum claims in deportation proceedings became possible only shortly before the passage of the Refugee Act of 1980. *Matter of Lam*, 18 I.&N. Dec. 15, 18, n. 4 (BIA 1981) ("we are only just now beginning to resolve some of the problems caused by this addition to our jurisdiction, including the problem of determining exactly how withholding of deportation and asylum are to fit together").

This renewability of application procedure is not unique to asylum. For example, where an application for lawful permanent resident status under § 245, 8 U.S.C. § 1255 (1982), has been denied by the district director, the application can be renewed in immigration court proceedings pursuant to 8 C.F.R. § 245.2(a). In contrast to § 208 (asylum) and § 245 (permanent resident status), § 243(h) (withholding) is exclusively a deportation relief that cannot initially be sought before the district director. Withholding is like any other deportation relief that is only available from the immigration court.[37]

Therefore, while it arguably might be anomalous to have two similar forms of relief in one deportation proceeding, the anomaly vanishes when understood in the context that § 208 (asylum) is an affirmative request for a benefit, while § 243(h) (withholding) is a deportation defense.

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[37]Other deportation remedies that are available exclusively in the immigration court context include suspension of deportation under § 244(a), 8 U.S.C. § 1254(a); waiver of exclusion and deportation under § 212(c), 8 U.S.C. 1182(c), *see Matter of Silva*, 16 I.&N. Dec. No. 26 (BIA 1976); and fraud waiver under § 241 (f), 8 U.S.C. 1251(f). These waivers and reliefs are available only when hardship or rehabilitation are demonstrated.

In fact, it is the Petitioner's position that would be anomalous. Under its construction, Congress provided two identical statutory remedies dealing with persecution with the same burdens of proof, but used different language. Respondent submits that Congress would not have been so redundant. If Congress had intended such a result, it would have used identical language. Congress specified two separate statutory provisions that generically deal with persecution, each with a distinct history traced by this Court in *Stevic*.

Thus, an analysis of the statutory structure of the asylum and withholding statutes demonstrates that the Ninth Circuit's interpretation does not result in an anomaly. *See Cardoza-Fonseca,* 767 F.2d 1448, 1451-52 (9th Cir. 1985); *Bolanos-Hernandez v. INS,* 767 F.2d 1277, 1283 (9th Cir. 1984); *Carvajal-Munoz,* 743 F.2d 562, 575 (7th Cir., 1984).

B. The Element Of Discretion In Asylum Forecloses Any Suggestion That The Withholding Provision Has Been Rendered Superfluous

The Petitioner also challenges the Court of Appeals' construction on the grounds that it would be incongruous to permit the "greater relief" of asylum to be granted on a lesser showing than that required for withholding of deportation. The Petitioner's contention is misleading and ignores several important factors in the scheme of the Immigration and Nationality Act.

Most significantly, § 243(h) withholding is mandatory while § 208 asylum is discretionary.[38] Therefore, the Ninth

[38]This Court has already recognized the significance of discertion as a distinguishing point. "The Congress distinguished between *discretionary grants of refugee admission or asylum* and the entitlement to a withholding of deportation if the § 243(h) standard was met." *Stevic,* 467 U.S. at 426. (emphasis added.)

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Circuit's holding (and the Supreme Court's assumption in *Stevic*) that the well-founded fear standard for asylum is more generous than the § 243(h) standard makes every bit of sense. Under this formulation of the standard, even though an alien has established a well-founded fear of persecution, the decisionmaker might appropriately deny asylum relief as a mater of discretion, for example, because of criminality on the part of the applicant, or use fraudulent documents to gain entry into the United States. *See, e.g., Matter of Shirdel,* Int. Dec. 2958 (BIA 1984). The decisionmaker might not want to award such an applicant with the "greater" relief of asylum which would qualify him or her for lawful permanent residence one year later. On the other hand, since these matters often involve life and death, § 243(h) withholding must be granted to such a person, but only if a higher standard of proof of persecution is established. Furthermore, under Article 33 of the U.N. Convention, which is the source for § 243(h), the United States' obligation of ***nonrefoulement*** requires withholding of deportation in such circumstances, yet does not require admission as a lawful permanent resident. This result surely does not render § 243(h) superfluous or useless as suggested by the Petitioner.[39]

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"Meeting the definition of 'refugee,' however, does *not* entitle the alien to asylum—the decision to grant a particular application rests in the discretion of the Attorney General under § 208 (a)." *Id.* at 423, n. 18.

[39]In an effort to minimize the distinguishing factor of discretion unique to asylum, the Petitioner boldly states that, as a matter of discretion, the Attorney General would never deport a person to the country of persecution when that person was eligible for relief. Pet. Brief at 20-22. The Petitioner's contention is nonsensical. Since the Board does not now apply two different standards of proof, the situation has not and cannot arise wherein an applicant establishes a well-founded fear of persecution but not a clear probability of persecution. Because

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CONCLUSION

The Refugee Act of 1980 codified for the first time an asylum statute which adopted an expanded version of the internationally accepted definition of refugee. The legislative history of the Refugee Act supports the conclusion that Congress specifically intended to incorporate a generous standard of proof for the new asylum provision based on the United Nations Protocol. The definition includes the well-founded fear of persecution standard of proof which, by its plain language and historical origins, is more generous than the clear probability standard applicable to withholding of deportation.

In view of the humanitarian spirit of the Refugee Act of 1980 and the life or death consequences involved, the Ninth Circuit correctly held that asylum applicants need only submit evidence which would lead a reasonable person to believe that he or she may be persecuted, i.e. that persecution is a reasonable possibility. The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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Attorneys for Respondent

July 1986

(Continued from previous page)

the Board is applying the same clear probability standard to both asylum and withholding, in every case where a clear probability of persecution has not been established, both applications are denied on eligibility grounds, and thus the issue of discretion is never reached.

RESPONDENT'S APPENDIX

UNITED NATIONS HIGH COMMISSIONER
FOR REFUGEES

HAUT COMMISSARIAT DES NATIONS
UNIES POUR LES REFUGIES

Delegation A Washington

Washington Liaison Office

1785 Massachusetts Ave., N.W.
Washington, D.C. 20036
Telephone: (202) 387-8546

January, 1982

Dear Mr Steinberg:

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D. *Comments on Certain Aspects of the definition of the term "Refugee"*

The *Handbook* deals with most of the issues mentioned below. Our present comments are simply in elaboration of what is contained therein.

a. *Burden of Proof*—The granting of asylum is a legal as well as a humanitarian act and since decisions on asylum may well decide the life or death of a person, UNHCR strongly holds that a high standard of fairness is essential in any asylum determination process. Thus, while in principle, the burden of establishing a valid claim rests with the individual claimant, unless there is reason to the contrary to doubt the credibility of a claimant, the benefit of the doubt should always be given to him even in the absence of other corroborative evidence. In UNHCR's view, therefore, the "balance of probabilities" standard is rather strict since any doubt should be resolved in favor of the claimant.

b. *Application of the "Refugee Definition*—UNHCR advocates liberal interpretation and application of the refugee definition in consonance with the

fundamental humanitarian character of the institution of asylum. A narrow and rigidly legalistic application of the definition would inevitably leave a large number of *bonafide* asylum seekers without refuge and would subvert the spirit of the Convention and/or Protocol. Immigration considerations, in particular, must not be brought to bear on the application of the refugee definition. The possibility for instance that, if one person were given asylum status, many others might also be entitled to claim asylum status is not a relevant consideration as to whether the asylum claim is a valid one. Moreover, any assumption of an abuse of procedures in order to gain entry into a country should not be allowed to weigh negatively in a judgment on the merits of specific asylum applications; such a posture would lead inevitably to a subversion of the spirit of national commitments to the Convention and Protocol.

c. *Fear of Persecution*—Refugees are generated by conditions, political in the broadest sense, which render continued residence intolerable or impossible. Concerned as it must be with events which have not yet occured, the refugee definition relates to with possibilities and probabilities rather than certainties. While past persecution is evidence to substantiate a well-founded fear, it need not be the only evidence. What has happened to others in similar circumstances, for instance, may be sufficient evidence of a well-founded fear of persecution. Where measures of persecution are found to be directed against a group of persons which have common characteristics, such measures must as a rule be considered to be directed against every member of the persecuted group. And a person who has not been persecuted simply because he has not yet attracted the attention of his government, need not wait until detection and persecution before he can claim refugee status. Nor need he be under the threat of imminent persecution. Moreover, a person need not be singled out for persecution in order to be a refugee; each claim however, must be assessed individually and once that takes place, it ought not to be rejected simply because a large number of others could also legitimately fear the same persecution.

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Sincerely,
Kallu Kalumiya
Legal Officer

UNITED NATIONS [SEAL] HAUT COMMISSARIAT
HIGH COMMISSIONER DES NATIONS UNIES
FOR REFUGEES POUR LES REFUGIES
Washington Liaison Office Delegation A Washington
1785 Massachusetts Ave., N.W.
Washington, D.C. 20036 Telephone: (202) 387-8546
April 15, 1982

Mr. K. Steinberg
Simmons and Ungar
517 Washington Street, Suite 301
San Francisco, California 94111

Dear Mr. Steinberg;

With reference to the letter we sent you early this year concerning, among other things, the UNHCR mandate and the definition of refugee as well as the situation of Salvadoran asylum seekers, two corrections should be noted:

i. at page four paragraph D. a "Burden of Proof"—the last sentence should read:

> "In UNHCR's view, therefore, *the clear probability standard* is rather strict since any doubt should always be resolved in favor of the claimant."

ii. at page seven, paragraph F. "Conclusions of the Executive Committee on the Protection of Asylum Seekers in Situations of Large-Scale Influx", the first sentence should read as follows:

> "At its 32nd Session (20 October 1981) the Executive Committee, of which the United States is a member, unanimously adopted the following recommendations with regard to protection of asylum seekers in situations of large-scale influx: . . ."

We apologize for any inconvenience that may have been caused by these errors.

Sincerely,

United Nations High Commissioner
for Refugees
Washington Liaison Office